Supreme Court of the United States

OCTOBER TERM, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK,

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

LOUIS J. VORHAUS,
521 Fifth Avenue,
New York, N. Y.,
Counsel for Appellee.

DAVID VORHAUS,
JOSEPH FISCHER,
of Counsel.

SUBJECT INDEX

TABLE OF CASES CITED

STATUTES CITED

MISCELLANEOUS

Supreme Court of the United States

OCTOBER TERM, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

Opinion Below

The opinion of the Municipal Court is now unofficially reported.

Frank v. *N. Y., C. & St. L. R. Co.*, 24 N. Y. S. (2d) 846 (adv. sheets).

Jurisdiction

After the noting of probable jurisdiction, appellee filed a motion to dismiss the appeal upon the ground, not previously advanced, that the appeal is improperly directed to the Appellate Term of the Supreme Court of the State

of New York, First Department, instead of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District. That motion is pending, undetermined.

Summary of Argument

Section 143, New York Railroad Law, as applied in this case, does not conflict with Section 20a, Interstate Commerce Act. Section 20a does not apply.

The consolidation by which appellant was formed was effected under the laws of five states, among them New York, at a time when the State laws providing for consolidation had not been superseded as to interstate carriers by Federal enactment.

Under Section 142 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49) the new corporation created by the consolidation acquired all of the property of its constituent companies. Section 143 provides that all the debts and liabilities of the constituent companies shall thenceforth attach to the new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it.

The then existing liability of the Lake Erie & Western Railroad Company upon its guaranty of the Northern Ohio interest coupons attached to appellee, the consolidated corporation, as an incident to the consolidation, by force of the statute pursuant to which the consolidation was effected. It was not a new obligation assumed by the new corporation, but an existing obligation which attached to it. It did not come within the purview of Section 20a of the Interstate Commerce Act; it is not an assumption for which application to and authorization by the Interstate Commerce Commission were required.

Section 20a is not aimed at the subsisting debts and liabilities of the constituents of a consolidated corporation.

It is not the purpose of that section to permit those debts and liabilities to be extinguished or the rights of the holders thereof impaired. Yet such result would follow, if Section 20a were held to extend to such cases, from the mere failure or deliberate refusal of the new corporation to apply to the Interstate Commerce Commission for leave to assume liability or from the refusal of the Commission to grant such authority—that would constitute a deprivation, without due process of law of the rights and property of the creditors of the constituent corporations.

When application was made to the Commission by this appellant consolidated corporation for authority to operate the lines of its constituents and to issue its own capital stock in exchange for the capital stock of its constituents, pursuant to the Articles of Consolidation, the Commission was cognizant of the provisions of the applicable state statutes by the terms of which the liabilities of the constituent corporations attached to the new corporation and, in effect, approved those terms, when it authorized the proposed issue and found that such issue was "compatible with the public interest * * * necessary and appropriate for and consistent with the performance by the carrier of service to the public as a common carrier, and will not impair its ability to perform that service".

The Interstate Commerce Commission has not construed Section 20a as including, under the term "assume", the attachment to a consolidated corporation, created under State laws, of the subsisting obligations of its constituents. The administrative interpretation seems to be the other way.

The appeal should be dismissed because improperly taken from the Appellate Term of the New York Supreme Court, instead of the Municipal Court, to which the record was remitted and in which the judgment was perfected.

ARGUMENT

POINT I

Section 143, New York Railroad Law, as applied in this case, does not conflict with Section 20a of the Interstate Commerce Act.

The consolidation by which appellant was created was effected under State laws (R. 7; 13, 23), at a time when Section 407 of the Transportation Act of 1920, 41 St. L. 480, Chap. 91, U. S. C. Title 49, Section 5, amending Section 5 of the Interstate Commerce Act, had not yet become applicable to such cases.

> *Snyder* v. *N. Y., Chicago & St. Louis R. Co.*, 278 U. S. 578, 49 S. Ct. 176, affirming 118 Ohio St. 72.

Since that time, by Section 5, subdivision (4) of the Interstate Commerce Act, as amended (Act June 16, 1933, Chap. 91, Sec. 202), the Congress has taken over the field so far as relates to the consolidation of interstate carriers, thus superseding, in such cases, the State statutes.

This case, however, deals with a consolidation validly effected under State statutes.

Section 142 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49) provided:

> "Upon the consummation of such act of consolidation all the rights, privileges, exemptions and franchises of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act * * *."

It is conceded that appellant did acquire the properties of its constituent companies (R. 7, 14).

The Lake Erie & Western Railroad Company, one of the constituents of the consolidated corporation (R. 7, 13), had guaranteed payment of interest coupons of the Northern Ohio bonds, in October, 1895, simultaneously with the issuance of the bonds (R. 12, 13). This was before the enactment of Section 20a of the Interstate Commerce Act (U. S. C. Title 49; 41 Stat. 494; Act Feb. 28, 1920, C. 91, Section 439), and the validity of that guaranty is not here in question.

New York Railroad Law (Consolidated Laws of New York, Chap. 49), Section 143, provides:

> "The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it * * *."

The purpose of the State statute is to charge the consolidated corporation and its property with the subsisting debts and liabilities of its constituent corporations and to prevent their extinction and defeat by the transfer of property effected by consolidation. Section 20a of the Interstate Commerce Act is not aimed at such debts and liabilities; it relates to obligations and liabilities newly created or assumed; its field of operation is wholly distinct from that covered by the State statute.

> *Missouri-Kansas-Texas R. Co.* v. *Mars*, 278 U. S. 258, 49 S. Ct. 103.

No new obligation was here "assumed" by appellant. The liability had been created by The Lake Erie & Western R. R. Co., and as an existing obligation of one of its con-

stituents "attached" to the consolidated corporation. Appellant's liability is not predicated upon any "assumption" under Section 20a, but upon the fact that the rights of creditors of the constituent corporations were preserved by consolidation under Section 143. It was not a guarantee which appellant "assumed" but an old liability which "attached" to the new corporation.

Friedman v. *N. Y. C. & St. L. R.R. Co.*, N. Y. L. J., April 27, 1940, p. 1740 (per Rosenman, J.).

Certainly, Section 20a cannot be construed as conferring upon a consolidated corporation any option or discretion to reject or repudiate any debt or liability which prior to the consolidation had been incurred by any of the constituent corporations; or as granting to the Interstate Commerce Commission the power to authorize such rejection or repudiation.

Nueces Valley Townsite Co. v. *San Antonio U. & E. R. Co.*, 123 Tex. 167, 67 S. W. (2d) 215, 221.

It was not the purpose of Section 20a to permit the debts and liabilities of the constituent corporations to be defeated or the rights of their creditors to be impaired. Yet such result would follow, if Section 20a were held to extend to such cases as this, from the mere failure or deliberate refusal of the new corporation to apply to the Interstate Commerce Commission for leave to assume liability or from the refusal of the Commission to grant such authority. That would constitute a deprivation, without due process of law of the rights and property of the creditors of the constituent corporations.

While the bondholders may have a remedy in equity against the mortgaged properties (*R.R. Co.* v. *Howard*, 7 Wall. 392), they cannot be limited and restricted to that remedy—they cannot be compelled to forego the guaranties or the liability thereon, which, through consolidation, devolved upon appellant.

Under Section 142 of the New York Railroad Law, all of the property, assets and effects of all of the constituent corporations have become transferred to and vested in the new corporation and became "as effectually the property of the new corporation as they were of the former corporations". Following consolidation, action in the New York courts upon any of the debts and liabilities of any of the constituent corporations must be brought against the new corporation.

Cameron v. *United Traction Co.*, 67 N. Y. App. Div. 557;

Lee v. *Stillwater & Mechanicville Street R. Co.*, 140 N. Y. App. Div. 773.

The Lake Erie & Western Railroad Company, whose property and assets have vested in appellant, is left by the consolidation in this position: "There is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness" (*Mount Pleasant* v. *Beckwith*, 100 U. S. 514).

If, in these circumstances, the bondholders may not enforce the guaranty of The Lake Erie & Western Railroad Company by recourse to the liability which, as a condition of the consolidation is imposed upon the new corporation by Section 143, to be "enforced against it and its property to the same extent as if incurred or contracted by it"; if the bondholders are to be limited to their recourse against the mortgaged properties (for, surely, they could not unscramble the commingled assets of the consolidated corporation), then, clearly, their claims are impaired by the transfer of the property, and if Section 20a were to be construed as requiring the authorization of the Interstate Commerce Commission in such a situation, then, certainly, the creditors of the constituent corporations are deprived of their rights and property without due process of law, and this, of course, may not be done even in the regulation of commerce.

United States v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 327, 51 S. Ct. 159.

There is no need to consider whether the attachment of liability is or is not the result of voluntary action. The question is whether under Section 20a the term "assumption" applies to a liability which attaches upon consolidation. We submit it does not; it connotes new issues of securities and new assumptions of financial responsibility.

Cases are cited which speak of "assumption" by a consolidated corporation of the liabilities of the old companies. But in those cases the expression was employed loosely and not in the sense which appellant seeks to impress upon it.

> "It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result."
>
> *Crane* v. *Bennett*, 177 N. Y. 106, 112.

No provision of Section 20a applies to the facts of this case or deals with the obligations which attached on consolidation under State laws.

Citations bearing upon the evils of the issuance of excessive amounts of securities or the assumption of excessive security obligations in order to acquire new lines (*Financial Investigation of N. Y., N. H. & H. R. R. Co.*, 31 I. C. C. 32, 41-43; *St. Louis & San Francisco Railroad Investigation*, 29 I. C. C. 139, 150) are not in point. Sharfman, *The Interstate Commerce Commission*, Vol. 1, page 192, quite correctly refers to the large discretionary control vested in the Commission (by Sec. 20a) over the amount and character of "new issues" of railroad securities and of "new assumptions of financial responsibility". The obligations involved in the present case fall within neither category.

The Mann-Elkins Bill (61st Congress, 2d Session, H. R. 17536) failed in the Senate; whatever might have been its effect, if enacted, the fact is that Section 20a, subsequently enacted, eliminated, and, we submit, did not embrace "the assumption of all or any of the bonds or other obligations of the corporations so consolidated or merged", and so left the status of those obligations to the operation and effect of the State consolidation statutes, until by the amendment of 1933, they were superseded, so far as interstate carriers were concerned, by Section 5, subdivision (4) of the Interstate Commerce Act.

This Court, in *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 44 S. Ct. 376, referred to Section 20a as subjecting to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all "future" shares of stock, bonds or other evidences of indebtedness.

There was here, in respect of the guaranty, no new obligation, no new assumption of financial responsibility and no additional burden imposed upon the consolidated corporation.

The fact that the Commission, in *Assumption of Obligations by L. S. & I. R. R.*, 86 I. C. C. 640, entertained and granted the application is no indication that the Commission construed Section 20a as requiring the making of such application. Rather, from the language it used, the inference is that the Commission deemed the State statutes fully effective in attaching liability irrespective of the application.

Such also is the inference to be drawn from other decisions by the Commission, not involving the attachment to the consolidated corporation of the existing liabilities of its constituents:

> "The applicant is the successor, by consolidation, of the Toledo, St. Louis & Western Railroad Co. and other companies and by virtue of such consolidation

has acquired all property, rights and powers and has assumed all obligations of the Toledo, St. Louis & Western Railroad Co."

Pledge of Toledo, St. Louis & Western Bonds by New York, Chicago & St. Louis Railroad, 86 I. C. C. 465 (1924).

It is to be noted that the Toledo, St. Louis & Western is one of the parties to the consolidation here under consideration (R. 7, 13-14, 24).

"The first mortgage bonds of the Northern bear the guaranty of the Lake Erie & Western, predecessor lessee, and unpaid interest coupons have been purchased on behalf of the New York, Chicago & St. Louis. From the consolidation of the Lake Erie & Western with the New York, Chicago & St. Louis, resulting liability of the latter on the Lake Erie's guaranty of the Northern's bonds thus is apparently admitted."

Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization, 228 I. C. C. 645.

This has reference to the same guaranty upon which the present suit is predicated

"It appears that the consolidation was completed on April 11, 1923, and that the new company is now vested with the property, rights and franchises of the Nickel Plate and other constituent companies, subject to all their debts, obligations and liabilities."

New York, Chicago & St. Louis R. R. Bonds, 82 I. C. C. 365.

Missouri, Kansas, Texas Railroad Co. v. *Mars*, 278 U. S. 258, 49 S. Ct. 103, did not involve a merger. There the appellant had acquired railroad properties from a group who had purchased them from a receiver of the corporation which had originally owned them. A Texas statute authorized such a receivership sale but provided

that the property so sold should be sold subject to certain tort claims. The property was bought from the receiver subject to these tort claims and the new company took the properties from the purchasers subject to these claims. Appellant there sought to invoke Section 20a of the Interstate Commerce Commission Act to excuse a refusal to honor such a tort claim. This Court held Section 20a to be inapplicable.

Railroad Commission v. *Southern Pacific Company*, 264 U. S. 331, 44 S. Ct. 376, bears no analogy to the case at bar. There, the State Commission sought to impose upon an interstate carrier a new "undertaking", i.e., the building of a union station. As already observed, the opinion of this Court in that case (264 U. S. at p. 347) referred to Section 20a, as subjecting to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all "future" shares, etc. It did not treat of existing obligations devolving upon a corporation by consolidation.

New York, C. & St. L. R. Co., Assumption of Obligations, 217 I. C. C. 598, and *New York, C. & St. L. R. Co., Bonds and Assumption*, 221 I. C. C. 772, both relate to assumption of liability under agreements extending maturity dates. Since they related to new evidences of debt, they were, of course, governed by Section 20a. But it must be manifest from both of those instances that the construction placed upon Section 20a both by the Commission and by the appellant was such that in respect of the obligations which attached upon consolidation, no application or authority to assume liability was required. 217 I. C. C. 598 related to bonds, which the Lake Erie & Western had issued prior to the consolidation and were to mature January 1, 1937. 221 I. C. C. 772 related to bonds which the former New York, Chicago & St. Louis had issued prior to the consolidation and were to mature Octo-

ber 1, 1937. It is clear that from the time of the consolidation in April, 1923 (R. 7, 13, 23), until November, 1936, and August, 1937, respectively, when these applications to authorize the extensions were made, this appellant consolidated corporation had paid the interest upon the original bond issues, without application to the Commission for or grant by the Commission of authority to do so—obviously because such application and authority in that connection were deemed, and rightly so, to be unnecessary.

New York Central Securities Corp. v. *United States*, 54 F. (2d) 122, aff'd 287 U. S. 12, 53 S. Ct. 45; *Texas* v. *United States*, 292 U. S. 522; 54 S. Ct. 819; *People* v. *New York Central R. Co.*, 233 N. Y. 679, and *Whitman* v. *Northern Central Ry. Co.*, 146 Md. 580, 127 Atl. 112, are not germane, since they do not relate to liabilities attaching by consolidation.

Although with regard to liabilities and obligations which attached by consolidation, application to and approval by the Interstate Commerce Commission were not required, nevertheless the Commission did have and did exercise the power of approval in another manner. This appellant consolidated corporation applied to the Commission for authority to operate the lines of its constituents and to issue its own capital stock in exchange for the capital stock of its constituents, pursuant to the Articles of Consolidation (R. 14). This application so to issue its own stock appellant was bound to make under Section 20a. When this application was made the Commission was fully cognizant of the provisions of the applicable State statutes by the terms of which the liability of its constituents attached to the consolidated corporation. This is clearly shown by the opinion which the Commission rendered:

> "Applicable state laws afford means to effect the consolidation. Such laws are in force. They are, in fact, the laws to which resort must be had to effectuate consolidations which the interstate commerce act is

designed to facilitate. We cannot conclude that they have been nullified or superseded. As valid existing laws we have no power to suspend them."

Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company, 79 I. C. C. 581, 585 (June 18, 1923).

It is fair to assume, therefore, that when the Commission granted to appellant the authority to operate the lines and issue its stock in exchange for the stock of its constituents, it necessarily approved the conditions under which the consolidation was effected, including the attachment to the new company of the liabilities of its constituents; for it found, and under Section 20a(2) it could make the order only if it did find, that such new issue was "compatible with the public interest * * * necessary and appropriate for and consistent with the performance by the carrier of service to the public as a common carrier, and will not impair its ability to perform that service".

POINT II

The appeal should be dismissed because improperly taken from the Appellate Term of the Supreme Court of the State of New York, First Department, instead of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, to which the record was remitted and in which the judgment was perfected.

Motion for dismissal on that ground has been filed and is pending. In this brief, therefore, we merely supplement the argument already submitted on that motion.

In *Atherton* v. *Fowler*, 91 U. S. 143, this Court adverted to the fact that "in some states—as, for instance, New York and Massachusetts—the practice is for the highest court, after its judgment has been pronounced, to send the record

and the judgment to the inferior court, where they thereafter remain". And in *Radice* v. *New York*, 264 U. S. 292, 293, 44 S. Ct. 325, where, after affirmance by the New York Court of Appeals, the record had been remitted to the City Court of Buffalo, in which the cause originated, the writ of error was allowed by this Court to the City Court.

CONCLUSION

The appeal should be dismissed, or, in the alternative, the judgment should be affirmed.

Respectfully submitted,

Louis J. Vorhaus,
521 Fifth Avenue,
New York, N. Y.,
Counsel for Appellee.

David Vorhaus,
Joseph Fischer,
of Counsel.